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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO, *et. al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT INTER-AMERICAN DEVELOPMENT BANK *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The International Bank for Reconstruction and Development [hereinafter World Bank or Bank] is an intergovernmental organization created under Articles of Agreement[1] adopted at a conference of 44 nations at

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[1] 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 *amended* by, 16 U.S.T. 1942, T.I.A.S. No. 5929 (1945).

Bretton Woods, New Hampshire in July 1944. The Articles of the World Bank entered into force and the Bank was established on December 27, 1945. The United States ratified this international agreement and became a member of the Bank pursuant to the Bretton Woods Agreements Act of 1945, 22 U.S.C. § 286 *et seq.* (1976).

The Inter-American Development Bank [hereinafter IDB] is a regional development bank created by the Agreement Establishing the Inter-American Development Bank [2] adopted at Washington, D.C. in April, 1959. This Agreement entered into force for the United States on December 30, 1959, pursuant to the Inter-American Development Bank Act of 1959, 22 U.S.C. § 283 *et seq.* (1976).

The primary purposes of the World Bank and the IDB include making development loans to member states for productive purposes.

As of December 1981, the World Bank had 141 member governments and employed nearly 6,600 persons, including citizens of 110 countries. Its staff is located in the Bank's offices and resident missions in 36 countries. As of December 1981, the IDB had 43 member governments and employed nearly 1,900 persons from 39 countries, with its staff located in its offices and resident missions in 26 countries. Both institutions have their headquarters in Washington, D.C.

Under the Immigration and Naturalization Act of 1952,[3] a special "G-4" visa was created for officers and employees of public international organizations such as *amici*, and their families.[4] Almost 60 percent of *amici*'s

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[2] 73 Stat. 299, 10 U.S.T. 3029, T.I.A.S. No. 4397 (1959).

[3] 8 U.S.C. § 1101 *et seq.* (1976).

[4] 8 U.S.C. § 1101 *et seq.* (1976). The Act divides aliens to be admitted into the United States into two general categories: (1)

employees are non-immigrant aliens holding G-4 visas. Respondents are dependents of such employees.[5] *Amici* have a strong interest in the just and non-discriminatory treatment of their employees and their employees' dependents, including those who are not citizens of the United States. For the reasons offered below *amici* respectfully suggest that Petitioners' admission and tuition policy violates Respondents' constitutional rights.

The parties have consented to the filing of this Brief. Their letters of consent are being filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a much more limited class of aliens than Petitioners and their supporting *amici* describe. *Amici* believe this case can be decided on the narrow ground of the Supremacy Clause without resolving the sweeping due process and equal protection issues raised by Petitioners.

The University of Maryland, its President, and the 49 states which appear as *amici*, contend that if the decision

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Immigrant aliens who are admitted for permanent residence and are issued "immigrant" or "permanent resident" visas; (2) Non-immigrant aliens who are permitted to enter the United States under 12 different classifications, which correspond to the different visas they hold. The classifications appear in 8 U.S.C. § 1101(a)(15)(A) through (L). Respondents and the members of their class were admitted as non-immigrant aliens under 8 U.S.C. § 1101(a)(15)(G)(iv): "Officers, or employees of . . . international organizations and the members of their immediate families."

[5] The named plaintiffs are or were at the time the suit was brought dependents of employees of the Inter-American Development Bank and of the World Bank. Joint Appendix at 6a-14a.

below is affirmed large numbers of non-immigrant alien students will be permitted to qualify for in-state benefits, causing what they claim would be devastating financial burdens on public universities. *See, e.g.*, Brief for *amici*, Alabama *et al.* at 3. However, this case, contrary to Petitioners' implications, does not involve the entire class of non-immigrant aliens. Rather, it involves only a relatively small number of G-4 aliens who have been admitted lawfully into the United States for an indefinite period and who are able to meet the same state law standards for domicile applied to all other students and their parents. Non-immigrant aliens holding other types of visas, including student visas, requiring them to maintain residence outside the United States and all aliens, including those holding G-4 visas, who do not meet state domiciliary criteria, would not benefit from a decision in favor of Respondents and as a consequence would not be eligible for in-state tuition and admission status.

Petitioners and their supporters also raise broad questions of constitutional law. They question the continued vitality of the irrebuttable presumption doctrine and the applicability to non-immigrant aliens of the equal protection analysis relied upon by the courts below. These are extremely important questions. Nevertheless, given the circumstances of this case, *amici* wish to call this Court's attention to other grounds for decision which may preclude the necessity for deciding whether the irrebuttable presumption doctrine should be overruled or whether non-immigrant aliens are members of a suspect class.

Although *amici* herein wholeheartedly adopt Respondents' equal protection and due process analysis (*see* Brief for Respondents, Arguments I & III), we believe this case can be decided, without difficulty, on the basis of a narrow application of the Supremacy Clause. U.S. CONST. art. I, cl. 2. Supremacy Clause claims were

raised below (see Record at 193-197), and were decided by the district court. It held Petitioners' policy unconstitutional under the Supremacy Clause although it rejected one of Respondents' specific arguments in that regard concerning interference with international agreements. *Moreno v. Toll*, 489 F.Supp. 658, 667 (D.Md. 1980) (Petition for Certiorari at 29a, 44a-47a); *Moreno v. Univ. of Maryland*, 645 F.2d 217, 220 (4th Cir. 1981) (Petition for Certioari at 1a, 5a-6a).

In recent years, distinguished commentators have argued that the Supremacy Clause and federal preemption analysis provide a conceptually desirable standard for assessing state regulations that burden aliens. *See, e.g.*, C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 64-65 (1969); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1063-1064 (1979); Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?* 31 STAN. L. REV. 1069 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L. J. 940 (1980).[6]

Since 1915 this Court has recognized the validity of preemption and equal protection arguments in analyzing burdens on aliens. *Truax v. Raich*, 239 U.S. 33, 39, 42 (1915). More recently, this Court has often mentioned preemption as a sound alternative in cases concerning state burdens on aliens. *E.g., Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977); *Examining Board v. Flores de Otero*, 426 U.S. 572, 602 (1976). In *Graham v. Richardson*, 403 U.S. 365, 376, 380 (1971), this Court relied

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[6] "The inadequacy of equal protection doctrine has prompted some scholars to urge the adoption of a federal preemption standard for analyzing state regulations that disproportionately burden aliens. Because of the plenary federal interest in immigration . . . and foreign affairs, federal preemption provides an appropriate framework for the analysis of alienage regulations." *Id.* at 941.

on both preemption and equal protection analyses to invalidate the challenged statute.

Petitioners' policy of charging out-of-state tuition to Maryland domiciliaries who are lawfully admitted G-4 aliens violates the Supremacy Clause in at least two ways. First, *amici* believe Petitioners' policy impermissibly conflicts with specific provisions of international agreements and federal statutes exempting G-4 aliens employed by *amici* and other international organizations from certain federal and state taxes. The dollar differential the University charges G-4 aliens for tuition is, in essence, a "tuition tax." Maryland could not directly violate international agreements ratified by Congress, nor federal statutes enacted by Congress, by imposing a state income tax on G-4 aliens. Petitioners cannot achieve the same result indirectly by imposing a "roughly equivalent" (*see* Brief for Petitioners at 23) tuition tax. The policy also reduces the funds available to implement *amici*'s objectives and purposes defined in international agreements. Because the tuition differential clearly conflicts with, burdens, and effectively nullifies the federal exemption, and interferes with the objectives of the international agreements by which *amici* were created, it is void.

Second, Petitioners' policy impermissibly intrudes upon the exclusive power of the United States government to regulate the admission and residence of aliens. State laws which impose discriminatory burdens upon the residence of lawfully admitted aliens are invalid. Petitioners' policy burdens G-4 aliens who meet the criteria for common law domicile in Maryland by requiring them to pay higher, out-of-state tuition and fees, while permitting citizens and immigrant aliens domiciled in the state to pay lower, in-state tuition and fees. The policy, therefore, conflicts with the special treatment accorded G-4 aliens by the United States and interferes with federal concern for the education of lawfully admitted

domiciliary aliens. The policy imposes additional financial burdens on G-4 aliens and subjects their dependents to unjustifiably more stringent admission requirements. Because Petitioners' interests are not sufficiently legitimate, substantial, or precisely drawn to justify this significant conflict with the federal government's plenary power to regulate the admission and residence of aliens, their policy is invalid.

Amici respectfully suggest that where, as here, a state policy conflicts with specific international agreements and federal statutes, and also interferes with the exclusive power of the government of the United States to regulate the residence of aliens it is void under the Supremacy Clause.

ARGUMENT

I. PETITIONERS' POLICY IS VOID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPERMISSIBLY CONFLICTS WITH SPECIFIC INTERNATIONAL AGREEMENTS CREATING INTERNATIONAL ORGANIZATIONS SUCH AS *AMICI* AND WITH SPECIFIC FEDERAL STATUTES WHICH EXEMPT EMPLOYEES OF *AMICI* FROM CERTAIN FEDERAL AND STATE INCOME TAXES.

A. State Law Which Burdens or Conflicts with International Agreements or Federal Laws is Void Under the Supremacy Clause.

Amici believe that Petitioners' policy impermissibly conflicts with specific provisions of international agreements[7] and their implementing federal statutes exempting G-4 employees of *amici* and similar international organizations from certain federal and state income taxes. For example, the Articles of Agreement of the World Bank specifically provide that "no tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals." 60 Stat. 1440, T.I.A.S. No. 1502, Art. VII, § 9(b); *accord*, Agreement Establishing the Inter-American Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397, Art. XI, § 9(b). These provisions are also incorporated into federal law providing that this tax exemption shall have "full force and effect" in the United States. 22 U.S.C. § 286h (1976).

This exemption is designed to benefit *amici* and other international organizations by enabling them to pay

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[7] International agreements authorized by Congress are equivalent to treaties for Supremacy Clause purposes. *Foster v. Nielson*, 27 U.S. 253, 314 (1812).

salaries without regard to the costs of taxation, thereby conserving their fiscal resources and thus permitting them to increase their lending activities to less developed countries. Moreover, the exemption prevents any member country, be it the United States or any other member country, from benefiting through taxes from the presence, within its borders, of *amici*'s employees who are not local nationals. The United States has explicitly recognized that the international agreements and statutes creating these exemptions are solely intended to benefit *amici* and other international organizations. Even if their employees wished to waive the exemptions in order to comply with Petitioners' policies they could not. 41 OP. ATT'Y GEN. 170, 172-173 (1954).

If Petitioners' policy "burdens or conflicts in any manner with any federal law or treaties," *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976), it may be found invalid under the Supremacy Clause. Indeed, if a state policy conflicts with a specific treaty or federal law, it is not necessary even to consider the justification for the policy or to balance it against the importance of the federal law or treaty. In fact, the Court need not pause to inquire whether there is any justification for the state policy, since "no state policy can prevail against" an international agreement. *United States v. Belmont*, 301 U.S. 324, 327 (1937).[8]

B. The State of Maryland Could Not Constitutionally Require G-4 Aliens Employed by *Amici* to Pay State Taxes on Income Paid by *Amici* and Petitioners May Not Accomplish Indirectly What the State Could Not Accomplish Directly.

Without doubt, if Maryland law required G-4 aliens to pay income taxes on their salaries paid by *amici*, it would

[8] "[T]he external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning." *Id.* at 331.

be void under the Supremacy Clause. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-420 (1948); *United States v. Belmont*, 301 U.S. 324, 332 (1937). Just as clearly, Petitioners may not accomplish indirectly what the State is not permitted to do directly.

That Petitioners penalize Respondents on account of their partial exemption from state income tax is evident from the record. Petitioners assert that an important rationale for their policy of denying in-state status to G-4 aliens is "cost equalization." Petitioners' explanation for charging lower tuition payments to other students is based on their assumption (not supported in the record) that those students already have made a significant contribution to the state university system through payment of state taxes.[9] Now that it is clear that G-4 aliens can acquire legal domicile in Maryland, see *Elkins v.*

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[9] G-4 aliens domiciled in Maryland do pay state taxes on income other than that obtained from *amici*. They also pay state property, sales, and other taxes. Many G-4 aliens are married to United States citizens who pay Maryland taxes on their income. Many others are married to alien spouses who, under federal regulation, are permitted to work and who also pay state tax on their income. 8 C.F.R. § 214.2(g)(2). Yet, under Petitioners' policy, dependents of *amici's* G-4 employees are compelled to pay out-of-state tuition. For example, Petitioners denied in-state tuition status to a United States citizen child of a G-4 employee of one of the *amici* who has lived in Montgomery County, Md. since 1963, is married to a U.S. citizen who has been regularly employed and has regularly filed state income tax returns. In another case, a husband and wife, both G-4 aliens, domiciled in Montgomery County since 1967, who have filed state income tax returns on rental property they own in Maryland, were denied in-state tuition status for their child, a U.S. citizen.

Conversely, citizens and permanent resident aliens whose incomes are insufficient to incur any state income taxes or whose incomes may be tax-exempt can nevertheless qualify for in-state status. Clearly, Petitioners' policy is not based on true cost equalization.

Moreno, 435 U.S. 647 (1978), Petition for Certiorari at 105a; *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), Petition for Certiorari at 137a, cost equalization between taxpayers and non-taxpayers has been the primary rationale advanced for denying nontaxpayers in-state status. Petitioners' Brief at 7, n.5.

Petitioners have claimed that the difference between in-state and out-of-state tuition is "an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year." Petitioners' Brief at 23. If Petitioners' policy is permitted to stand, a part of the tax exemption the federal government explicitly conferred on G-4 alien employees of *amici* and certain other international organizations will be nullified for those employees whose dependents wish to attend the University of Maryland. Petitioners' policy attempts to substitute a tuition differential for the tax that is barred by international agreements and by a specific federal statute. Accordingly, it "burdens or conflicts" with a clearly defined federal policy and, *amici* believe, is void under the Supremacy Clause. *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976).

C. Petitioners' Policy Hampers the Operation and Objectives of *Amici*.

Petitioners seek to defend the challenged tuition differential on the ground that "neither the students nor their parents need to pay the differential at all, because the bank itself pays it in the form of tuition equalization subsidy." Brief for Petitioners at 23. Although *amici* are currently reimbursing their employees for various portions of the difference between the in-state and out-of-state tuition charges levied by Petitioners, that fact supports Respondents, not Petitioners. To attract and maintain a competent professional staff, *amici* have had to divert funds from other purposes to provide a tuition subsidy. Petitioners candidly acknowledge the direct connec-

tion between the University's policy and the tax exemption granted under international agreements. They state that the "dollar differential" at issue here is "roughly equivalent to the amount of state income tax an international bank parent is spared" each year by treaty. *Id.* *Amici* are forced to pay that "dollar differential" and every dollar they pay reduces the intended benefits of that tax exemption and reduces the funds available to implement *amici's* international objectives and purposes.

Amici's concern has also been recognized by the United States in the context of a prior unsuccessful attempt by Montgomery County, Maryland to force G-4 alien employees of international organizations residing in that County (some of whom were County domiciliaries) to pay at least partial tuition if they wished their children to attend the County's public elementary and secondary schools. *Armour v. Bd. of Educ. of Montgomery Cty., Md.*, Equity No. 67672 (Mont. Cty. Cir. Ct.) (filed June 25, 1979).[10] The U.S. Department of State noted that the

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[10] After the suit was filed, but before decision, the Board of Education adopted a substitute policy which provided for the collection of tuition from students enrolled in the Montgomery County public schools who were not legally domiciled in the County. The policy included a presumption that aliens (but not citizens) could not be domiciled in the State unless they made an affirmative showing of domicilary status. That policy also provided that non-domiciled students would receive a proportionate credit against tuition to the extent their parents "make payment from one or more of the major sources from which the Montgomery County public schools derive revenue"—namely state and local income taxes, state sales taxes, and county property taxes. The Circuit Court stayed further proceedings pending an administrative appeal to the State Board of Education. The case was resolved when the State Board decided that the challenged policy, by denying free public education to certain residents of the State, was "invalid both as a matter of law and as being contrary to the educational policies of the state." Statement of Decision, No. 79-10, August 29, 1979. Subsequently, the case was dismissed by the court.

proposed tuition differential had "aroused considerable concern within the diplomatic and international organization community" and had "the potential for affecting adversely relations between the United States and foreign countries whose representatives are serving here in an official capacity." [11] The U.S. Treasury Department recognized that international financial institutions, like *amici*, played an ever-increasing role in the promotion of a sound international monetary system and in the economic development of less-developed countries and asserted that the County's policy, like the Petitioners' policy challenged here, would seriously interfere with their mission:

> For these institutions to perform properly their important duties, it is essential that they continue to attract capable professionals from many countries to serve on their staffs. Imposition of the proposed tuition charges could create a severe hardship for many prospective employees, particularly those in lower pay scales, and could hinder the recruiting of the highly-qualified individuals the institutions require.[12]

Therefore, because Petitioners' policy impermissibly interferes with the objectives, as defined by international agreements, of *amici* and similar international organizations, *amici* believes it is invalid under the Supremacy Clause.[13]

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[11] Letter from Kit Dobelle, Chief of Protocol, U.S. Dep't of State, to Mrs. Marian Greenblatt, President, Board of Education, Montgomery County (March 16, 1979), filed with the Court in *Armour v. Bd. of Educ. of Montgomery Cty., Md.*, Equity No. 67672 (Montgomery Cty. Cir. Ct.) (filed June 25, 1979).

[12] Letter from C. Fred Bergsten, Asst. Sec. for International Affairs, U.S. Dept. of Treasury, to Mrs. Marian Greenblatt, President of the Montgomery County Board of Education (April 19, 1979), filed with the Court in *Armour v. Bd. of Educ. of Montgomery Cty., Md.*, Equity No. 67672 (Montgomery County Cir. Ct.) (filed June 25, 1979).

[13] Although it would be inappropriate for *amici* to inform this Court of its own nation's foreign policy, *amici* note that the United States considers its "participation in . . . international financial

II. PETITIONERS' POLICY IS VOID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPERMISSIBLY INTERFERES WITH THE EXCLUSIVE POWER OF THE FEDERAL GOVERNMENT TO REGULATE THE ADMISSION AND RESIDENCE OF ALIENS.

A. The Admission and Residence of Aliens is Exclusively a Federal Concern.

Under the United States Constitution, Congress has the exclusive authority over matters of immigration and naturalization. U.S. CONST. art I, § 8, cl. 4; *Henderson v. Wickham*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876).[14] In a proper exercise of its power,

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institutions" to be "an important part of efforts by the United States to assist less developed countries . . . ." 22 U.S.C. § 262c (a)(5) (1976). Further, the Senate Foreign Relations Committee has indicated that it believes such institutions "play an important role in assisting the economic and social progress of the developing countries" and that this role has helped "develop sounder mutually beneficial relations . . . [between the United States and] developing countries." S.REP. NO. 159, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 2670, 2677. More recently, the House of Representatives noted that "the banks serve as important bridges, helping to link the political and economic concerns of their donor and recipient countries . . . . The banks provide forums for constructive dialogue and cooperative action on common international problems . . . ." HOUSE COMM. ON THE BUDGET, Report on THE OMNIBUS RECONCILIATION ACT OF 1981, H.R. REP. NO. 158, Vol. 1, 97th Cong., 1st Sess. 3 (1981) (Testimony of Deputy Ass't Sec. of the Treasury Thomas Dawson urging "continued strong western support for the banks.")

That Petitioners' policy may interfere with the international commitments of the United States and its relationships with foreign governments, emphasizes the propriety of resolving this case on Supremacy Clause grounds. *E.g., Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *United States v. Pink*, 315 U.S. 203, 233 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

[14] See to the same effect *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81, 84-85 (1976); *De Canas*

Congress enacted the Immigration and Naturalization Act of 1952 (INA), 8 U.S.C. Sec. 1101 *et seq.*, establishing a comprehensive federal scheme for the admission and residence of aliens. As part of that scheme, Congress provided for the admission and indefinite residence of non-immigrant aliens who are officials or employees of international organizations in which the United States participates. 8 U.S.C. § 1101(a)(15)(G)(iv); 22 C.F.R. § 41.1 (1981).

"Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). "State laws which impose discriminatory burdens upon the entrance or *residence* of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (emphasis added). State regulation "not Congressionally sanctioned that discriminates against aliens lawfully admitted to the country" violates the Supremacy Clause if it "imposes additional burdens not contemplated by Congress." *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1975).

B. Petitioners' Policy Imposes Additional Burdens on the Residence of Aliens Not Contemplated by Congress.

In the INA Congress provided that G-4 aliens are not precluded from acquiring domicile in the United States, although most other categories of non-immigrant aliens are not accorded that benefit. *Elkins v. Moreno*, 435 U.S. 647, 663-668 (1978); Petition for Certiorari at 119a-125a. Congress has also decided that G-4 aliens employed by *amici* may reside and establish domicile in the United

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v. Bica, 424 U.S. 351, 354 (1976); *Graham v. Richardson*, 403 U.S. 365, 376-380 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); *Truax v. Raich*, 239 U.S. 33, 42 (1915); *Chinese Exclusion Case*, 130 U.S. 581 (1889).

States without becoming subject to certain federal and state taxes on income received from *amici* and other international organizations. Thus, for reasons it found sufficient, Congress has granted G-4 aliens special privileges not ordinarily accorded non-immigrant aliens.[15]

Petitioners' policy interferes with that federal scheme in two ways. First, it is inconsistent with the federal determination that G-4 employees of *amici* and other international organizations are entitled both to establish domicile in the United States and an income tax exemption on their official salaries. It thus impairs the privileges Congress conferred. *See* Argument I(B).

Second, it imposes additional and discriminatory burdens upon G-4 aliens domiciled in Maryland not contemplated by Congress. The most obvious discrimination is financial. The policy requires that G-4 aliens pay higher tuition and fees while permitting citizens and immigrant aliens to pay lower tuition and fees.[16]

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[15] Petitioners' point to two federal statutes which deny certain classes of aliens welfare or educational benefits offered to citizens. Brief for Petitioners at 24. Petitioners then argue that their policy is permissible because it is consistent with federal policy. But this Court has made clear that state distinctions affecting aliens must stand or fall on their own merits. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) in which this Court explained why it had earlier, in *Mathews v. Diaz*, 426 U.S. 67 (1976), applied "relaxed scrutiny" to the validity of a federal statute conditioning an alien's eligibility for Medicare benefits on the satisfaction of a durational residency requirement, even though there was no similar burden on citizens. As the Court pointed out, "the appellants can draw no solace from the [*Diaz*] case, however, because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *See also, Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976) ("[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State."); *Oyama v. California*, 332 U.S. 633, 665 (1948) ("The state acquires no power whatever to impose racial discriminations upon resident aliens from the Congressional power to exclude some or all aliens on a racial basis.").

[16] Throughout this litigation Petitioner's have maintained that their policy cannot be construed as discriminating against aliens

However, the burdens are not merely monetary. Perhaps even more importantly, denial of in-state status subjects the student to more stringent admission standards and may result in denial of admission to the University. Like most other state universities, Maryland reserves a a large proportion of its admissions for in-state applicants. Thus, even though Respondents are domiciliaries and residents of Maryland, *see Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), they are more likely to be denied admission than are applicants Petitioners consider to be in-state candidates despite the fact that their academic credentials are equivalent or even higher. *See, University of Maryland, Determination of In-State Status for Admission, Tuition, and Charge Differential Purposes.* Petitioners' Brief for Certiorari at 167a. If Respondents sought admission to universities outside of Maryland they would clearly and appropriately be considered nonresidents of those other states. Accordingly, if Petitioners' policy stands, there will be no state in which Respondents could qualify for in-state status, or could compete on an equal basis with other applicants.

Amici believe that the interests asserted by Petitioners to justify their policy are not sufficiently legitimate, substantial or precisely drawn to withstand constitutional scrutiny. *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976); *see* Brief for Respondents, Argument I(B). Prior to 1974, the University apparently functioned quite effectively without any such policy. Furthermore, the justifications asserted by Petitioners have shifted dramatically in the course of this litigation. Even the "cost equalization" rationale now asserted bears little relationship to real world facts—

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because it applies only to non-immigrant aliens, not all aliens. However, a state's classification can be unconstitutional even if it discriminates solely against a subclass of aliens. *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977). "The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9.

many G-4 aliens (and their spouses) contribute substantially to the revenues of the state; many citizens and permanent resident aliens do not.[17] Further, permanent resident aliens employed by *amici* have the same tax exemption as G-4 visa holders but are nonetheless considered students for tuition and admission purposes by Petitioners. If "cost equalization" were truly the touchstone, the University could adopt a much more precisely tailored policy. Deference to a state policy which intentionally treats domiciliary aliens in a discriminatory manner substantially undermines Congress' power to regulate the admission and residence of aliens in the United States.

CONCLUSION

Amici are international persons created by over 100 sovereign nations including the United States. As *amici* have shown, Petitioners' policy has an impact not only on Respondents and their families but also on the institutions Respondents serve. Since the policy at issue in this case conflicts with specific treaties and federal laws, and also interferes with the exclusive federal power to regulate the residence of aliens, *amici* respectfully suggest that the policy violates the Supremacy Clause of the United States Constitution. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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[17] *See supra* n.9.

CERTIFICATE OF SERVICE

I, Donald N. Bersoff, Attorney for *Amici Curiae*, certify that on December 21, 1981, I served by mail three copies of the foregoing brief of *Amici Curiae* on Stephen H. Sachs, Attorney General of Maryland, 1400 One South Calvert Building, Baltimore, Maryland 21202, Counsel for Petitioners, and on James R. Bieke, Esquire, Shea & Gardner, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036, Counsel for Respondents.

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